

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

11 KENNETH DON BARRETT,) 3:14-cv-00678-HDM-WGC
12 Petitioner,)
13 vs.) ORDER
14 WARDEN LEGRAND, et al.,)
15 Respondents.)
16 _____)

17 Before the court are the petition for writ of habeas corpus
18 pursuant to 28 U.S.C. § 2254 (#5), respondents' motion to dismiss
19 (#11) and exhibits (#12-20), petitioner's response (#24),
20 respondents' reply (#28) and exhibits (#29), petitioner's motion to
21 extend time (#30) and supplement to his response (#31), respondents'
22 motions to strike (#33, 35), and petitioner's motion for leave to
23 correct injustice and supplement exhibits (#34).

24 **I. Procedural History**

25 **A. Conviction and Direct Appeal**

26 On March 20, 1986, in the Eighth Judicial District Court of the
27 State of Nevada, petitioner was charged by information in Case No.
28 86C073673 (C73673) with burglary, robbery with the use of a deadly

1 weapon, victim 65 years of age or older, and grand larceny auto. (Ex.
2 12). The following day, petitioner was charged by information in Case
3 No. 86C073702 (C73702) with grand larceny auto, burglary, robbery with
4 the use of a deadly weapon, and attempted murder with the use of a
5 deadly weapon. (Ex. 14). The district court granted the state's
6 motion to consolidate the two informations and try them jointly before
7 the same jury. (Exs. 11 at 5, 33). The petitioner went to trial, and
8 he was found guilty and convicted of all counts. (Ex. 57).

9 The state filed a notice of intent to seek habitual criminal
10 enhancement and the district court adjudicated the petitioner a
11 habitual criminal. (Exs. 59, 62 (C73702), 63 (C73673)). The court
12 filed the judgment of conviction in C73702 on December 23, 1986. (Ex.
13 62). Defendant was sentenced to 9 years for grand larceny auto (count
14 1), 9 years plus an additional 10 for a total of 19 by virtue of being
15 a habitual criminal for burglary (count 2), 14 years plus a
16 consecutive 14 years on the enhancement for robbery with the use of
17 a deadly weapon (count 3), a term of 19 years plus a consecutive 19
18 years on the enhancement for attempt murder with a deadly weapon
19 (count 4). (*Id.*). The sentence was to run consecutive to the Arizona
20 sentence the petitioner was serving. (*Id.*).

21 The court filed the judgment of conviction in C73673 on December
22 30, 1986. (Ex. 63). Defendant was sentenced to a term of 9 years for
23 burglary (count 1), 14 years plus a consecutive 14 years on the
24 enhancement for robbery with the use of a deadly weapon, victim 65
25 years of age or older (count 2), "an additional TEN (10) years to be
26 added on for a total of NINETEEN (19) years plus NINETEEN (19) years
27 on the enhancement by virtual of being a habitual criminal," and a
28 term of 9 years for grand larceny auto (count 3). (*Id.*). The

1 sentence was to run consecutive to the Arizona sentence the petitioner
 2 was serving. (*Id.*).

3 Petitioner filed a notice of appeal on December 31, 1986. (Ex.
 4 64). While the appeal was pending, the district court *sua sponte*
 5 filed amended judgments for both C73673 and C73702 to clarify that the
 6 sentences were to run consecutive to petitioner's existing federal
 7 sentence. (Exs. 79, 81 (C73673), 82 (C73702)). The Nevada Supreme
 8 Court affirmed the convictions, and remanded the case for
 9 consolidation of judgments and clarification of which statute the
 10 district court used to enhance petitioner's sentence. (Ex. 83). The
 11 remittitur issued on July 11, 1989. (Ex. 84).

12 On September 13, 1989, the district court filed the second
 13 amended judgments of conviction. (Exs. 85 (C73673), 86 (C73702)).
 14 In C73673, the court clarified that petitioner's sentence for robbery
 15 with use of a deadly weapon, victim over 65 had been enhanced pursuant
 16 to the deadly weapon enhancement, and not pursuant to the victim 65
 17 years or older or habitual criminal enhancements. (Ex. 85). The
 18 court clarified that the habitual criminal enhancement attached to
 19 count 2 in C73702, and modified the sentence to, "NINE (9) 9 years
 20 plus an additional 10 years attached by virtue of being a habitual
 21 criminal for BURGLARY." (Exs. 86, 11 at 50).

22 **B. First State Habeas Petition**

23 Petitioner filed his first state habeas petition on July 6, 1990.
 24 (Ex. 91). The court denied the petition on January 17, 1991. (Ex.
 25 97). Petitioner did not appeal. On March 11, 1991, in response to
 26 a motion to clarify, the court found the order was a denial for post-
 27 conviction relief. (Ex. 11 at 17).

28 **C. First Motion for Modification and First Motion for**

Correction of an Illegal Sentence

2 On December 3, 1997, petitioner filed his first motion for
3 modification of sentence. (Ex. 116). The court denied the motion on
4 December 18, 1997. (Ex. 117). Petitioner appealed.¹ (Ex. 121).

5 On December 26, 1997, petitioner filed his first motion for
6 correction of an illegal sentence. Ex. 118). The court denied the
7 motion. (Exs. 120, 125). Petitioner appealed.² (Ex. 126).

8 The Nevada Supreme Court consolidated petitioner's appeals of his
9 motion to correct illegal sentence and motion for modification of
10 sentence. On April 12, 2000, the Nevada Supreme Court dismissed
11 petitioner's appeals in Case Nos. 31690, 31691, 31813. (Ex. 138).
12 The remittitur issued on May 9, 2000. (Ex. 139).

D. Second State Habeas Petition

14 On July 27, 1999, petitioner filed his second state habeas
15 petition challenging a disciplinary action that occurred while he was
16 incarcerated. (Ex. 130). On November 22, 1999, the court dismissed
17 in part and denied in part the petition. (Ex. 136). Petitioner did
18 not appeal.

E. Additional Documents Filed in State Court

20 Petitioner filed a second motion for modification of sentence on
21 May 10, 2006. (Ex. 140). The court denied the motion and petitioner
22 did not appeal. (Ex. 143).

23 On March 9, 2009, petitioner filed a third motion for
24 modification of sentence. (Ex. 144). The district court denied
25 petitioner's third motion for modification of sentence on April 20,

¹ Nevada Supreme Court Case No. 31690/31691.

² Nevada Supreme Court Case No. 31813.

1 2009, and denied his motion for reconsideration on July 30, 2009.
 2 (Exs. 147, 155). Petitioner did not appeal.

3 On April 22, 2014, petitioner filed a second motion to correct
 4 an illegal sentence, alleging that he was subject to two enhancements,
 5 deadly weapon and habitual criminal. (Ex. 172). On May 14, 2014, the
 6 district court orally denied the motion as to C73673, and granted in
 7 part as to C73702, amending count 2 to 9 years. (Ex. 11 at 70). On
 8 May 23, 2014, the district court filed a third³ amended judgment of
 9 conviction in C73702. (Ex. 177). Consistent with its May 14, 2014
 10 order, the court amended count 2 by removing the habitual criminal
 11 enhancement and ordering that the petitioner serve no more than 9
 12 years and no less than 9 years for burglary. (*Id.*). Petitioner
 13 appealed.⁴ (Ex. 175).

14 On October 15, 2014, the Nevada Supreme Court affirmed the denial
 15 of petitioner's second motion to correct an illegal sentence in
 16 C73673, and the partial denial of his second motion to correct an
 17 illegal sentence in C73702 (consolidate Case Nos. 65850/65851). (Ex.
 18 198). The Nevada Supreme Court held that petitioner's sentence was
 19 properly corrected in C73702 and that the petitioner had failed to
 20 demonstrate that his sentence in C73673 was illegal. (Ex. 198). The
 21 remittitur issued on November 12, 2014. (Ex. 200).

22 On October 30, 2014, the Nevada Supreme Court denied as moot
 23 petitioner's motion for leave to appear in proper person and an
 24 opening brief in each appeal that were received on October 10, 2014.
 25 (Ex. 199). The Nevada Supreme Court further denied petitioner

26
 27 ³ The judgment is incorrectly labeled the second amended judgment.
 28

⁴ Nevada Supreme Court Case Nos. 65850/65851.

1 permission to file briefs on the matters. (Ex. 199).

2 **F. Federal Proceedings**

3 Petitioner submitted his first habeas petition on or about May
4 11, 2001. (Case No. 3:01-cv-00338-ECR-VPC, #6). He challenged his
5 convictions in C73702 and C73673, alleging, *inter alia*, ineffective
6 assistance of trial and appellate counsel, prosecutorial misconduct,
7 trial court error, juror misconduct, and that his sentences were
8 unconstitutional. On January 23, 2003, petitioner moved to
9 voluntarily dismiss his petition in order to apply to the Nevada
10 Pardons Board. (*Id.* at #39). The court granted the petitioner's
11 motion and dismissed the action without prejudice on January 28, 2003.
12 (*Id.* at #40).

13 Petitioner commenced this action on December 18, 2014. (#5).
14 The petition raises two grounds for relief. Ground one is a claim
15 that the state court should have removed petitioner's use of a deadly
16 weapon enhancement instead of the habitual criminal enhancement in
17 C73673. Ground 2 is a claim that in C73702, petitioner should have
18 been charged with robbery with a deadly weapon, and not attempted
19 murder with a deadly weapon. Respondents argue that any allegations
20 regarding petitioner's sentence in C73673 are untimely. Respondents
21 also argue that the petitioner waived his rights to challenge his
22 convictions in C73673 by voluntarily dismissing his first federal
23 habeas petition. Finally, respondents argue that both grounds 1 and
24 2 in the petition are unexhausted.

25 **II. Standards**

26 **A. Timeliness**

27 The Antiterrorism and Effective Death Penalty Act of 1996
28 (AEDPA) imposes a one-year statute of limitations habeas corpus

1 petitions filed by state prisoners in federal court. 28 U.S.C.
 2 § 2244(d)(1). Section 2244(d) provides, in pertinent part:

3 A 1-year period of limitation shall apply to an
 4 application for a writ of habeas corpus by a person in
 5 custody pursuant to the judgment of a State court. The
 6 limitation period shall run from the latest of-

7 A) the date on which the judgment became final by
 8 the conclusion of direct review or the expiration of the
 9 time for seeking such review;

7 B) the date on which the impediment to filing an
 8 application created by State action in violation of the
 9 Constitution or laws of the United States is removed, if
 10 the applicant was prevented from filing by such State
 11 action;

10 C) the date on which the constitutional right
 11 asserted was initially recognized by the Supreme Court,
 12 if the right has been newly
 13 recognized by the Supreme Court and made retroactively
 14 applicable to cases on collateral review; or

15 D) the date on which the factual predicate of the
 16 claim or claims presented could have been discovered
 17 through the exercise
 18 of due diligence.

19 State prisoners whose convictions became final prior to the
 20 AEDPA's enactment had a one-year grace period in which to file their
 21 petitions. *Calderon v. United States Dist. Ct. (Beeler)*, 128 F.3d
 22 1283, 1286 (9th Cir. 1997), overruled in part on other grounds by
 23 *Calderon v. United States Dist. Ct. (Kelly)*, 163 F.3d 530, 540 (9th
 24 Cir. 1998) (en banc). For purposes of the AEDPA limitations period,
 25 "a judgment becomes 'final' in one of two ways - either by the
 26 conclusion of direct review by the highest court, including the United
 27 States Supreme Court, to review the judgment, or by the expiration of
 28 time to seek such review." *Wixom v. Washington*, 264 F.3d 894, 897
 (9th Cir. 2001). When a petitioner pursues a direct appeal to the
 state's highest court but declines to pursue a writ of certiorari with
 the United States Supreme Court, the conviction becomes final upon the
 expiration of time to file a petition for writ of certiorari. See
Jimenez v. Quarteman, 555 U.S. 113, 119 (2009). Thus, absent tolling

1 or delayed accrual, state prisoners whose convictions became final
2 prior to April 24, 1996, had until April 24, 1997, to file their
3 federal habeas petitions. *Patterson v. Stewart*, 251 F.3d 1243, 1245-
4 46 (9th Cir. 2001).

5 The one-year time limitation is tolled either equitably or during
6 the pendency of properly filed state petitions challenging the
7 judgment or claim at issue. 28 U.S.C. § 2244(d)(2); *Holland v.*
8 *Florida*, 560 U.S. 631, 645 (2010). Equitable tolling is available "if
9 extraordinary circumstances beyond a prisoner's control make it
10 impossible to file a petition on time." *Beeler*, 128 F.3d at 1288.
11 Generally, a litigant seeking equitable tolling bears the burden of
12 establishing two elements: (1) that he has been pursuing his rights
13 diligently, and (2) that some extraordinary circumstance stood in his
14 way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). An untimely
15 state post-conviction petition is not "properly filed" and does not
16 toll the period of limitation. *Duncan v. Walker*, 533 U.S. 167, 181-82
17 (2001).

18 **B. Exhaustion**

19 It is well established that exhaustion is required before a
20 federal court may consider the petition for a writ of habeas corpus.
21 28 U.S.C. § 2254(b). To exhaust a ground for relief, a petitioner
22 must fairly present that ground to the state's highest court,
23 describing the operative facts and legal theory, and give that court
24 the opportunity to address and resolve the ground. See *Duncan v.*
25 *Henry*, 513 U.S. 364, 365 (1995); *Anderson v. Harless*, 459 U.S. 4, 6
26 (1982). Both the Supreme Court of the United States and the Court of
27 Appeals for the Ninth Circuit have held exhaustion requires petitioner
28 to present squarely and clearly in his brief the issues that he wanted

1 considered in his appeal. *Castillo v. McFadden*, 399 F.3d 993, 999-
 2 1000 (9th Cir. 2005) (citing *Baldwin v. Reese*, 541 U.S. 27, 31-32
 3 (2004)). “Submitting a new claim to the state’s highest court in a
 4 procedural context in which its merits will not be considered absent
 5 special circumstances does not constitute fair presentation.” *Roettgen*
 6 *v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994) (citing *Castille v.*
 7 *Peoples*, 489 U.S. 346, 351(1989)).

8 “[A] petitioner for habeas corpus relief under 28 U.S.C. § 2254
 9 exhausts available state remedies only if he characterized the claims
 10 he raised in state proceedings *specifically* as federal claims. In
 11 short, the petitioner must have either referenced specific provisions
 12 of the federal constitution or statutes or cited to federal case law.”
 13 *Lyons v. Crawford*, 232 F.3d 666, 670 (9th Cir. 2000) (emphasis in
 14 original), *amended*, 247 F.3d 904 (9th Cir. 2001). Citation to state
 15 case law that applies federal constitutional principles will also
 16 suffice. *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003) (*en*
 17 *banc*). “The mere similarity between a claim of state and federal
 18 error is insufficient to establish exhaustion. Moreover, general
 19 appeals to broad constitutional principles, such as due process, equal
 20 protection, and the right to a fair trial, are insufficient to
 21 establish exhaustion.” *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir.
 22 1999) (citations omitted).

23 **III. Analysis**

24 **A. Ground 1**

25 Ground 1 is a claim that the 5th, 6th, 8th, and 14th Amendments
 26 were violated because the state court should have removed his use of
 27 a deadly weapon enhancement in C73673 instead of the habitual criminal
 28 enhancement pursuant to the rule of lenity. (#5 at 4-5). Petitioner

1 alleges that the state court imposed consecutive sentences as to all
2 of his convictions and that the district court failed to correct his
3 illegal sentences. (*Id.*). Petitioner alleges that the state agreed
4 that the habitual criminal enhancement was improper, but that the
5 state court failed to correct the judgment. (*Id.*).

6 In case C73673, the last judgment was filed on September 13,
7 1989, when the state district court entered a second amended judgment
8 of conviction. (Ex. 85). As such, the conviction in C73673 became
9 final prior to the enactment of the AEDPA. See *Jimenez*, 555 U.S. at
10 119. Therefore, petitioner had until April 24, 1997, to file a
11 federal habeas corpus petition, unless the limitations period was
12 otherwise tolled. Petitioner mailed in his current federal habeas
13 corpus petition to this court on December 23, 2014, more than fifteen
14 years after the federal limitation period expired. (#1). The
15 petition is therefore untimely as to any challenges to petitioner's
16 sentence in C73673.

17 Petitioner contends in response to the motion to dismiss that his
18 third amended judgment in case C73702 restarts the AEDPA one-year
19 statute of limitations period for both cases C73702 and C73673. (#24
20 at 12-13). However, the two judgments are separate and independent
21 judgements, and, therefore, the filing of third amended judgment in
22 C73702 does not alter the limitation period for filing his habeas
23 petition in C73673. Additionally, petitioner fails to show that any
24 "extraordinary circumstances" exist in this case to provide a basis
25 for equitable tolling of the federal limitation period.

26 To the extent that the petitioner challenges his sentence in
27 C73702, respondents correctly argue that petitioner did not raise this
28 claim with the Nevada Supreme Court in either his direct appeal, his

1 first modification of sentence, his first motion for correction of an
2 illegal sentence, or his second motion to correct an illegal sentence.
3 Ground 1 is therefore time barred as to C73673 and unexhausted as to
4 C73702.

5 **B. Ground 2**

6 Ground 2 is a claim that the 5th, 6th, and 14th Amendments were
7 violated because it was not the legislative intent to separately
8 punish multiple acts that occur close in time and constitute one
9 course of criminal conduct. The petitioner alleges that the
10 enhancement for use of a deadly weapon should not apply for both
11 robbery and attempted murder. Thus, the petitioner alleges that in
12 case C73702 he should have only been charged with robbery with a
13 deadly weapon, and not attempted murder with a deadly weapon, since
14 the robbery and attempted murder were part of the same course of
15 criminal conduct.

16 The court concludes that the petitioner did not raise this claim
17 with the Nevada Supreme Court in either his direct appeal, his first
18 modification of sentence, his first motion for correction of an
19 illegal sentence, or his second motion to correct an illegal sentence.
20 Petition argues instead that both grounds have been exhausted as he
21 filed an opening brief in the Nevada Supreme Court on October 10,
22 2014. (#24 at 24). However, the Nevada Supreme Court denied
23 petitioner's motion as moot on October 30, 2014, and, therefore, did
24 not consider the motions on the merits. Thus, petitioner failed to
25 exhaust ground two in case C73702. See *Castille*, 489 U.S. at 351.

26 **IV. Certificate of Appealability**

27 In order to proceed with an appeal from this court, petitioner
28 must receive a certificate of appealability. 28 U.S.C. § 2253(c)(1);

1 Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946,
 2 950-51 (9th Cir. 2006). Generally, a petitioner must make "a
 3 substantial showing of the denial of a constitutional right" to
 4 warrant a certificate of appealability. 28 U.S.C. § 2253(c)(2); *Slack*
 5 *v. McDaniel*, 529 U.S. 473, 483-84 (2000). To make this "threshold
 6 inquiry," the petitioner "must demonstrate that the issues are
 7 debatable among jurists of reason; that a court could resolve the
 8 issues [in a different manner]; or that the quests are adequate to
 9 deserve encouragement to proceed further." *Lambright v. Stewart*, 220
 10 F.3d 1022, 1024-25 (9th Cir. 2000) (first quoting *Slack*, 529 U.S. at
 11 485; then quoting *Barefoot v. Estelle*, 468 U.S. 880, 893 n. 4 (1983)).

12 This court has considered the issues raised by petitioner, with
 13 respect to whether they satisfy the standard for issuance of a
 14 certificate of appealability, and determines that none meet that
 15 standard. The court will therefore deny petitioner a certificate of
 16 appealability.

17 **IT IS THEREFORE ORDERED** that respondent's motion to dismiss (#11)
 18 is **GRANTED in part**. Ground 1 is **DISMISSED WITH PREJUDICE** as untimely
 19 to the extent it challenges his sentence in C73673 and **DISMISSED**
 20 **WITHOUT PREJUDICE** to the extent it challenges his sentence in C73702
 21 as unexhausted. Ground 2 is **DISMISSED WITHOUT PREJUDICE** for
 22 petitioner's failure to exhaust his available remedies in state court.
 23 The clerk of the court shall enter judgment accordingly.

24 **IT IS FURTHER ORDERED** that petitioner is **DENIED** a certificate of
 25 appealability.

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27 . . .

28 . . .

1 **IT IS FURTHER ORDERED** that petitioner's motion to extend time
2 (#30), respondents' motions to strike (##33, 35), and petitioner's
3 motion for leave to correct injustice and supplement exhibits (#34)
4 are **DENIED as moot**.

5 DATED: This 23rd day of March, 2016.

Howard D McRabb

UNITED STATES DISTRICT JUDGE